85-640

Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LOUIS B. HUGHES and
PHILIP T. EICHELBERGER, JR.,
Petitioners,

v.

HOUSTON NORTHWEST MEDICAL
CENTER, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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63P

QUESTION PRESENTED

Whether the finding below that petitioners' appearance before an administrative agency constituted tortious interference with contract impermissibly infringed upon the Petition Clause of the First Amendment.

LIST OF PARTIES

The parties appearing as the appellants before the Court of Appeals for the First Supreme Judicial District of Texas and as the plaintiffs-counterdefendants before the district court were

Louis B. Hughes
Philip T. Eichelberger, Jr.

The parties appearing as the appellees before the Court of Appeals for the First Supreme Judicial District of Texas and as the defendants-counterplaintiffs before the district court were

Houston Northwest Medical Center, Inc.
Houston North Hospital Properties
Douglas Aycock
Jules Balette
Donald L. Chalmers
C. D. Delery
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William H. Fagan
Eugene Fontenot
Ralph Hawash
Charles Hill
Charles J. Howard
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Paul Sepulveda
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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
LIST OF PARTIES	II
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
A. Under The *Noerr-Pennington* Doctrine, Petitioning Activity Is Constitutionally Protected Unless It Is A "Sham."	8
B. Petitioners' First Amendment Petitioning Immunity Was Improperly Denied.	9
C. There Exists A Conflict Among The Circuit Courts of Appeal Concerning This Fundamental Constitutional Right.	13
D. Conclusion	14
APPENDICES	
A. Decision of the Court of Appeals of the First Supreme Judicial District of Texas dated August 30, 1984	1a
B. Charge of the Court and Special Issues	14a

TABLE OF AUTHORITIES

CASES	Page
Ad Visor, Inc. v. Pacific Telephone & Telegraph Co., 640 F.2d 1107, 1109 (9th Cir. 1981)	11
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)	8, 11
City of Cleveland v. Cleveland Electric Illuminating Co., 734 F.2d 1412, 1414 (6th Cir.), *cert. denied*, 105 S. Ct. 2536 (1984)	13
CVD, Inc. v. Raytheon Co., 769 F.2d 842, 851 (1st Cir. 1985)	13, 14
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, 143-44 (1961)	7, 8, 9, 10, 11, 13, 14
First National Bank of Omaha v. Marquette National Bank of Minneapolis, 482 F.Supp. 514, 521 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 460 U.S. 1042 (1981)	8, 9
Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 470-73 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)	11, 13
Havoco of America, Ltd. v. Hollobrow, 702 F.2d 643, 649, 650 (7th Cir. 1983)	8, 12
Hulcher v. Archer Daniels Midland Co., 409 N.E.2d 412, 415 (1980)	11
Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1176-77 (10th Cir. 1982)	11, 14
McDonald v. Smith, ____U.S.____, 86 L.Ed.2d 384 (1985)	8
MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081, 1155, 1158, 1204 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)	13
Omni Resource Development Corp. v. Conoco, Inc., 739 F.2d 1412, 1414 (9th Cir. 1984)	13
Sierra Club v. Butz, 349 F.Supp. 934, 938-39 (N.D. Cal. 1972)	9
State of Missouri v. National Organization for Women, 620 F.2d 1301, 1317-18 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980)	8
United Mine Workers v. Pennington, 381 U.S. 657, 669-670 (1965)	8, 9, 10, 13, 14
Vachon v. New Hampshire, 414 U.S. 478, 479 and n.3 (1974) (per curiam)	6
Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 644 n.* (1977) (Blackmun, J. concurring)	12
Williams v. Florida, ____U.S.____, 104 S. Ct. 1617, 1619 (1984) (Marshall, J. dissenting)	6

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. I 2, 6, 7, 8, 9
28 U.S.C. § 1257(3) 2

OTHER AUTHORITIES

Restatement (Second) of Torts § 682 (1977) 12

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

OPINIONS BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas is reported at 680 S.W.2d 838 (Tex. App.—Houston [1st Dist.] 1984), and is included here at Appendix A. Writ of error to the Supreme Court of Texas was refused, no reversible error.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the First Supreme Judicial District of Texas was entered on August 30, 1984. A timely motion for rehearing was overruled on November 15, 1984. A timely application for writ of error in the Supreme Court of Texas was refused,

and a timely motion for rehearing was denied on July 17, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In the early 1970's, a group of doctors, including Dr. Hughes, Dr. Eichelberger and the individuals named as respondents, decided to purchase land and build a hospital facility in north Houston, Texas. Three business organizations were ultimately formed for this purpose:

(1) Houston North Properties, a Texas general partnership (hereinafter "Properties");

(2) Houston North Hospital Properties, a Texas general partnership (hereinafter "Hospital Properties"); and

(3) Houston Northwest Medical Center, Inc., a Texas corporation (hereinafter "Medical Center").

Properties purchased a tract of land and sold a portion of it to Hospital Properties, which then constructed the hospital. Medical Center was retained by Hospital Properties to manage the hospital pursuant to a long-term lease.

In 1975, Dr. Hughes and Dr. Eichelberger were removed from the Hospital Properties partnership. They continued to be both partners in the Properties partnership and shareholders in the Medical Center corporation. The individual respondents, however, remained equity owners in all three business entities.

Beginning in mid-1979 and continuing for approximately one year, the individual respondents, through a series of transactions, caused a substantial transfer of assets away from the Properties partnership and the Medical Center corporation and toward the Hospital Properties partnership, the entity in which Drs. Hughes and Eichelberger no longer had any ownership interest. Drs. Hughes and Eichelberger, as minority owners, literally were powerless to prevent these transactions; moreover, they found it difficult, and occasionally impossible, to gain adequate information about their terms.

In June of 1982, the impact of these transfers became crystal clear. At that time, the Medical Center Corporation entered into a contract with a third party to sell its assets for $2.1 million while the Hospital Properties partnership entered into a similar contract valued at $58 million plus a percentage of the hospital's net monthly revenue for a period of ten years.

Petitioners immediately filed suit in the 11th Judicial District Court of Harris County, Texas against the Hospital Properties partnership, the Medical Center corporation, and the individual doctors who were the partners and shareholders in these entities. Petitioners' suit challenged the propriety of the asset-shifting transactions as a product of self-dealing and breach of fiduciary duty. Petitioners claimed, in essence, that they were victims of a clear investor squeeze-out which markedly reduced

the value of their shares in the Medical Center corporation in order to greatly enhance the value of the Hospital Properties partnership.

Immediately prior to trial, respondent Hospital Properties filed a counterclaim against petitioners alleging tortious interference with the contract for sale of the hospital owned by Hospital Properties. As that counterclaim unfolded at trial, it was predicated upon three purportedly tortious acts by petitioners:

(1) the filing of petitioners' lawsuit alleging investor squeeze-out;

(2) the filing of a lis pendens notice of petitioners' lawsuit on a tract of land owned by Hospital Properties; and

(3) the allegedly conspiratorial appearance of Dr. Eichelberger's wife, Reba Eichelberger, before the Texas Health Facilities Commission in opposition to exempting the sale of the hospital from the requirement of a certificate of need.

The third ground listed above refers to Mrs. Eichelberger's appearance as a party before the Texas administrative agency responsible for approving the transfer of ownership of hospitals.[1] In September of 1982, Mrs.

1. Respondents claimed that Mrs. Eichelberger opposed their exemption from the certificate of need requirement before the Texas Health Facilities Commission as part of a conspiracy with Drs. Hughes and Eichelberger. Although no issue of conspiracy or of an agency relationship was submitted to the jury, respondents were permitted to introduce evidence on Mrs. Eichelberger's appearance before the commission and to argue to the jury that she was there as part of a scheme to injure them. Thus, although Mrs. Eichelberger was the person actually petitioning the commission, liability for her activity was ultimately placed on Drs. Hughes and Eichelberger. Accordingly, the First Amendment right to petition the government is variously referred to herein as belonging to both Mrs. Eichelberger and petitioners.

Eichelberger opposed such a transfer from Hospital Properties to the third party purchaser. Mrs. Eichelberger had earlier submitted an application for a certificate of need to the Commission for a hospital in the Lake Houston area, which had been denied. (Statement of Facts, p. 972) When Hospital Properties sought permission to sell its hospital in 1982, then, Mrs. Eichelberger (a potential competitor of Hospital Properties) was understandably interested in seeing that the Commission reviewed the application to transfer ownership of the Hospital Properties' hospital in the same way that her earlier application for certificate of need had been reviewed.

Respondents argued to the jury that Mrs. Eichelberger, in conspiracy with petitioners, appeared before the Texas Health Facilities Commission for the purpose of interfering with the sale of the hospital. Mrs. Eichelberger was not a party to the instant litigation, and respondents have never suggested that she made any false statement in the Texas Health Facilities Commission proceeding.

The jury answered each of the twenty-two Special Issues against petitioners. (The charge of the court and the special issues are included here at Appendix B.) In particular, the jury found in Special Issue No. 19 that petitioners had tortiously interfered with Hospital Properties' contract for the sale of the hospital and, in Special Issue No. 20, that such interference had resulted in damages of $412,000.00 to Hospital Properties.

In Special Issue No. 19, respondents' counterclaim of tortious interference with contract was submitted to the jury in a single issue and with a single, general definition of the tort action. No distinction was made between the various alleged predicate acts of tortious interference, and

no mention was made of any First Amendment protection for petitioning activity or of a narrowly defined "sham" exception to that protection. In sum, based upon the mere definition of this common law tort—intentional action calculated to cause damage to a contractual relation, which action is done without justifiable cause—petitioners were stripped of their constitutional right to petition the government and found liable for $412,000 in damages.

Petitioners appealed the trial court's entry of judgment on the verdict of the jury, arguing that Mrs. Eichelberger's appearance before the Texas Health Facilities Commission was a privileged act because the proceeding was quasi-judicial in nature. The Court of Appeals for the First Supreme Judicial District of Texas rejected petitioners' argument and affirmed the judgment of the trial court in all respects material hereto. On motion for rehearing to the court of appeals, petitioners argued that Mrs. Eichelberger's petitioning conduct was constitutionally privileged. The motion for rehearing was denied without opinion, as was petitioners' application for writ of error to the Supreme Court of Texas and petitioners' motion for rehearing to that court.[2]

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2. Respondents claimed in the courts below that petitioners failed to properly preserve error on the issue raised herein. That claim ignores the objections made by petitioners' trial counsel to the introduction of all evidence concerning Mrs. Eichelberger's appearance before the Texas Health Facilities Commission (Statement of Facts, pp. 960-67, 984-85), as well as petitioners' express presentation of this constitutional issue to the court of appeals. In any event, the question in this appeal is so fundamental as to constitute plain error and deserves to be considered by this Court pursuant to Supreme Court Rule 34(1)(a). *See Williams v. Florida*, _____U.S._____, 104 S. Ct. 1617, 1619 (1984) (Marshall, J. dissenting); *Vachon v. New Hampshire*, 414 U.S. 478, 479 and n.3 (1974) (per curiam).

REASONS FOR GRANTING THE WRIT

This case presents an issue of constitutional significance concerning the circumstances under which a person may forfeit her First Amendment right to petition the government for a redress of grievances. In affirming the judgment of the trial court based on respondents' tortious interference with contract counterclaim, the Texas court of appeals' action was wholly inconsistent with petitioners' right to "freely inform the government of their wishes." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

The standard by which Mrs. Eichelberger's appearance before a Texas administrative agency was adjudged to be tortious made virtually no allowance for the constitutionally protected nature of her petitioning activity. The general definition of the tort of tortious interference with contract, which was the jury's only guide in determining petitioners' liability on the tortious interference counterclaim, is a substantial departure from established means of separating protected petitioning activity from "sham" behavior. Moreover, those courts to consider this issue, both federal and state, have struggled with distinguishing protected from unprotected petitioning activity. The precedents of both this Court and the lower courts do not provide a uniform method for making this determination; accordingly, review by this Court is necessary to ensure uniform application of the Petition Clause in this frequently arising situation. Finally, the decision of the court of appeals undermines the fundamental policy of free and open communication between a democratic government and its citizens by needlessly exposing those citizens who participate in this vital exchange to civil damage actions.

A. Under The *Noerr-Pennington* Doctrine, Petitioning Activity Is Constitutionally Protected Unless It Is A "Sham."

The Petition Clause of the First Amendment guarantees citizens the right to petition the government for a redress of grievances. Activity aimed at influencing the passage or enforcement of laws or at advocating a point of view to administrative agencies or to courts is protected by the right to petition and may not constitute a basis for liability under the Sherman Act. *Noerr, supra; United Mine Workers v. Pennington,* 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). The principal exception to this constitutional protection is for activity which is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[3] *Noerr,* 365 U.S. at 144.

While the Court has not spoken directly on the Petition Clause and the sham exception outside of the antitrust arena, the lower federal courts have applied the *Noerr-Pennington* doctrine in a variety of actions, including the common law tort of interference with contractual relations. *E.g., Havoco of America, Ltd. v. Hollobrow,* 702 F.2d 643, 649 (7th Cir. 1983) (*Noerr-Pennington* applies to tortious interference with business relations); *State of Missouri v. National Organization for Women,* 620 F.2d 1301, 1317-18 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980) (*Noerr-Pennington* applies to intentional infliction of harm without legal excuse); *First National*

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3. Another exception to First Amendment petitioning immunity is for libelous statements made during the course of petitioning activity. *McDonald v. Smith,* _____U.S._____, 86 L.Ed.2d 384 (1985). This exception is inapplicable here as respondents do not claim that Mrs. Eichelberger expressed any libelous falsehoods during the course of her appearance before the Texas Health Facilities Commission.

Bank of Omaha v. Marquette National Bank of Minneapolis, 482 F.Supp. 514, 521 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981) (*Noerr-Pennington* applies to civil rights actions under 42 U.S.C. § 1983); *Sierra Club v. Butz*, 349 F.Supp. 934, 938-39 (N.D. Cal. 1972) (*Noerr-Pennington* applies to interference with advantageous relationship).

The *Noerr-Pennington* doctrine played no role in the jury's evaluation of Mrs. Eichelberger's petitioning of the Texas Health Facilities Commission. No mention was made of the Petition Clause or of the protected nature of genuine petitioning activity. Instead, the jury simply was asked whether petitioners tortiously interfered with the contract of the Hospital Properties partnership.

B. Petitioners' First Amendment Petitioning Immunity Was Improperly Denied.

The decision of the court of appeals affirming the trial court's judgment fundamentally failed to satisfy the requirements for finding sham petitioning activity under *Noerr-Pennington*. The judgment below found petitioners guilty of tortious interference with contract. That judgment was predicated, in part, on petitioners' appearance before a Texas administrative agency, a clear instance of prima facie petitioning activity. The judgment, however, was based solely on the general definition of tortious interference with contract, which, by making no distinction between constitutionally protected and unprotected activities, inadequately safeguarded petitioners' constitutional right to petition.

The jury was allowed to find petitioners' appearance before an administrative agency an act of tortious inter-

ference with contract based solely on the criteria that petitioners' action was intended to cause damage to respondent Hospital Properties and that such action was taken without justifiable cause.[4] The first of these criteria —intent to harm a business foe—is insufficient to cause a forfeiture of *Noerr-Pennington* immunity. Common to most, if not all, petitioning activity in the business environment is the desire to injure competitors. *Noerr*, 365 U.S. at 143-44. Indeed, "[t]o hold that the knowing infliction of such injury renders the [petitioning] campaign itself illegal would thus be tantamount to outlawing all such campaigns." *Id.; see also Pennington*, 381 U.S. at 669-670.

The second criterion—action taken without justifiable cause—also fails to give adequate breathing room to the right to petition the government. The meaning of this ambiguous term is uncertain, and no guidance as to its definition was given to the fact finder below. Ambiguity can not be tolerated in distinguishing genuine petitioning activity from conduct which is a sham. The inevitable result is a trampling of the right to petition, as juries are left free to guess at the meaning of such terms. "Without justifiable cause" may be satisfied, for example, by the fact finder concluding that *on-balance* the merits of Mrs. Eichelberger's petitioning activity were unfavorable to her, or that *on-balance* the potential economic gains from her petitioning activity were outweighed by

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4. Special Issue No. 19, reprinted in full at Appendix B, defined tortious interference as follows:

> You are instructed that "tortious interference" means intentional action calculated to cause damage to Houston North Hospital Properties in regard to any contracts which it has and which action is done with the purpose of causing it damage or loss without justifiable cause on the part of Louis Hughes or Phillip Eichelberger, Jr. and which action results in actual damage or loss to Houston North Hospital Properties.

her costs in such activity; yet, neither of these conclusions approximates sham petitioning, and either one of them, if universally applied, would eviscerate the guarantees of the Petition Clause.

In addition to its ambiguity, the term "without justifiable cause" does not comport with this Court's statements of the sham exception as activity which is "nothing more than an attempt to interfere directly with the business relationships of a competitor," *Noerr*, 365 U.S. at 144, and "a pattern of baseless, repetitive claims" which leads "the fact finder to conclude that the administrative and judicial processes have been abused." *California Motor Transport*, 404 U.S. at 513. The sham concept put forth in *Noerr* requires, at a minimum, an absence of probable cause for the petitioning activity in order to deprive a party of her First Amendment immunity.[5] *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 (10th Cir. 1982). More often, the sham exception to *Noerr-Pennington* immunity is defined by determining whether the petitioning activity involved an abuse of process. *See Ad Visor, Inc. v. Pacific Telephone & Telegraph Co.*, 640 F.2d 1107, 1109 (9th Cir. 1981). This is the clear import of the focus on a "*pattern* of baseless, repetitive claims" in *California Motor Transport*. 404 U.S. at 513 (emphasis added).

Under either of these views of the sham exception, the finding below is infirm. The jury was not told to focus on a threshhold determination of whether Mrs. Eichel-

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5. The probable cause standard is satisfied if petitioning is predicated upon "a state of facts [that] would lead a man of ordinary caution and prudence to believe that he has a justiciable claim." *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 470 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983) (quoting *Hulcher v. Archer Daniels Midland Co.*, 409 N.E.2d 412, 415 (1980)).

berger had probable cause (a justiciable claim) to oppose Hospital Properties' certificate of need. Indeed, the jury easily could have believed that Mrs. Eichelberger met this standard but failed to demonstrate an on-balance justification for her petitioning.

Nor was the jury instructed to restrict its finding to a pattern of baseless, repetitive claims, *see Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 644, n.* (1977) (Blackmun, J. concurring), or to consider whether Mrs. Eichelberger's petitioning was primarily to accomplish a purpose for which the process was not designed. *See* Restatement (Second) of Torts § 682 (1977). The "pattern" concept of unprotected petitioning is inapplicable here since petitioners were alleged only to have brought the instant litigation (and filed a lis pendens notice incident thereto) and to have appeared before the Texas Health Facilities Commission—conduct insufficient to constitute a pattern of claims. *Cf. Havoco of America*, 702 F.2d at 650.

The traditional abuse of process standard was not met because the jury was not instructed to determine whether Mrs. Eichelberger's primary aim was some form of extortion of respondents. *See* Restatement (Second) of Torts § 682 comment b and illustration 4 (1977). Rather, they merely were required to find that her motive, in part, was to injure Hospital Properties and that her petitioning action was unjustified in some unspecified sense. Yet, for example, unjustified action could be the result of error or miscalculation or even an unforeseeable change in circumstances, none of which indicate a primary aim of extortion. The instruction on tortious interference given the jury made no distinction between petitioning predicated on error and conduct motivated by purposeful extortion.

In sum, the jury was not asked to find that petitioners knew their petitioning activity was unjustified.

Finally, the jury improperly was permitted to evaluate Mrs. Eichelberger's petitioning activity based upon a preponderance of the evidence. Petitioning activity may be stripped of its constitutional immunity only by proof of clear and convincing evidence. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985); *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1155, 1158, 1204 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). This elevated requirement of proof is necessary to safeguard the vitality of the Petition Clause. *MCI, id.* at 1155.

C. There Exists A Conflict Among The Circuit Courts of Appeal Concerning This Fundamental Constitutional Right.

Although the instant litigation arose under Texas law in the Texas state courts, the constitutional right at issue is controlled by the *Noerr-Pennington* doctrine. Defining the parameters of the sham exception to that doctrine has been the subject of much conflict in the federal courts. One court defined the sham exception as baseless petitioning "coupled with other characteristics of grave abuse." *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984). Other courts equate the sham exception to the abuse of process tort. *City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157, 1162-63 (6th Cir.), *cert. denied*, 105 S. Ct. 253 (1984); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 470-73 (7th Cir. 1982). Still another court characterized sham petitioning activity as "some-

thing more than a mere absence of probable cause." *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 (10th Cir. 1982). Finally, as discussed above, several courts require that sham activity be proved by clear and convincing evidence. *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985); *MCI*, 708 F.2d at 1158, 1204. Petitioners' constitutional right to petition the government should not depend upon either the circuit or the state in which they are made to defend their activity. Nor should there be a "law of the circuit" respecting a right so fundamental as to define an essential characteristic of our democratic process.

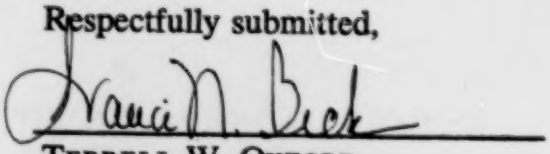
CONCLUSION

Holding petitioners liable in damages based upon a finding that their petitioning of a governmental agency constituted tortious interference with contract undermines the narrow sham exception to the *Noerr-Pennington* doctrine and strikes at the very heart of the Petition Clause of the First Amendment. Exposing citizens who speak the truth to their government to civil damage actions for tortious interference with contract without any additional safeguard for their petitioning activity inevitably will deter many from speaking at all and ultimately will stifle the dialogue which is the foundation of a representative democracy.

For the reasons set forth herein, petitioners Louis B. Hughes and Philip T. Eichelberger, Jr. respectfully pray that their Petition for Writ of Certiorari to the Court

of Appeals for the First Supreme Judicial District of Texas be granted.

Respectfully submitted,



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APPENDIX A

Louis B. HUGHES, et al.,
Appellants,

v.

HOUSTON NORTHWEST MEDICAL CENTER, INC., et al.,
Appellees.

No. 01-83-0109-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

Aug. 30, 1984.

Rehearing Denied Nov. 15, 1984.

Shareholders in corporation which had agreement to operate hospital owned by partnership brought action against corporation and partnership challenging termination of the agreement and raising other issues. The partnership counterclaimed for tortious interference with contract. The 215th District Court, Harris County, William W. Blanton, Jr., J., entered judgment against shareholders, and they appealed. The Court of Appeals, Robert R. Murray, J., Retired, held that: partnership's failure to list damages caused by delay in their cross claim did not preclude entering judgment for partnership for such damages; (2) evidence was sufficient to support judgment of tortious interference; (3) finding that shareholders brought derivative suit without reasonable cause was supported by the evidence; and (4) trial court erred in declaring that

partnership had no liability to shareholders on claims which might have been presented.

Affirmed as modified.

See also Tex. App., 647 S.W.2d 5.

John K. Grubb, Blackburn, Gamble, Henderson & Grubb, Dermot Rigg, Hoover, Cox & Shearer, Houston, for appellants.

Norman Reidmuller, Butler & Binion, Houston, for appellees.

Before DOYLE and JACK SMITH, JJ., and ROBERT R. MURRAY, J., Retired.

OPINION

ROBERT R. MURRAY, Justice (Retired).

This is an appeal from the judgment of the trial court denying plaintiffs relief on their cause of action and granting defendants judgment on their cross-action.

In 1971, several individuals executed instruments creating two general partnerships and one corporation for the purpose of acquiring, developing and operating the Houston Northwest Medical Center. Except for minor differences, when the three entities were intially formed, Houston North Properties, Houston Northwest Medical Center, Inc., and Houston North Hospital Properties had essentially the same owners, including plaintiffs, Dr. Louis B. Hughes and Dr. Phillip T. Eichelberger, Jr.

Houston North Properties, a partnership, acquired a 56-acre tract of land in northwest Houston. That partner-

ship is not a party to this suit. Houston North Hospital Properties (hereafter referred to as "the partnership") purchased 11 acres from Houston North Properties and constructed a hospital. Houston Northwest Medical Center, Inc. (hereafter referred to as "the corporation") was formed to operate the hospital as lessee.

When this suit was filed, plaintiffs were stockholders in the corporation but were no longer partners in the partnership. Plaintiffs were expelled from the partnership for failure to abide by the terms of the partnership agreement. *See Hughes v. Aycock,* 598 S.W.2d 370 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

After the hospital was completed, the corporation operated it under a lease from the partnership for 20% of the gross revenues. In mid-1980 the lease was canceled by agreement and a management contract was substituted in its place. At the same time, the corporation sold to the partnership all of its assets and liabilities, including two strips of land totaling 7.7 acres. The corporation continued to manage the hospital under the management contract. In June of 1982, the partnership announced that the hospital was to be sold and an agreement was made whereby the corporation would agree to cancel the management contract in return for $180,000. Plaintiffs filed this suit immediately upon learning of the proposed sale.

Plaintiffs brought this suit against the corporation, its officers and directors, and the partners of the partnership in the form of a shareholders' derivative suit alleging a breach of fiduciary duty concerning (1) the sale of 7.7 acres of land, (2) termination of the hospital lease in 1980, (3) the commingling of assets and liabilities of

the corporation and the partnership, and (4) the termination of the management contract in 1982. The corporation filed a counterclaim against plaintiffs for reasonable attorney's fees under section 5.14 F of the Texas Business Corporations Act for bringing a shareholders' derivative lawsuit without reasonable cause. The partnership filed a counterclaim against plaintiffs alleging that they conspired with Mrs. Reba Eichelberger (a non-party) to tortiously interfere in the contractual relationship of the partnership.

After a two-week trial, the jury resolved all issues against plaintiffs and in favor of the defendants and cross-plaintiffs. The trial court entered a judgment on the verdict against Drs. Hughes and Eichelberger for $412,000 on the counterclaim of the partnership, $92,000 in attorney's fees on the counterclaim of the corporation, canceled the lis pendens, entered a permanent injunction against plaintiffs filing a lis pendens, and entered a declaratory judgment declaring defendants' non-liability to plaintiffs. The plaintiffs perfected an appeal presenting fifteen points of error.

Plaintiffs' first point of error asserts that the trial court erred in entering judgment against them in the amount of $412,300, because the judgment did not conform to the pleadings. We overrule this point.

The partnership alleged a contractual relationship with a buyer involving an agreement whereby the partnership was to sell its hospital with a closing date of November 1982. It further alleged that plaintiffs conspired with Mrs. Reba Eichelberger, wife of Dr. Eichelberger, to delay and prevent the sale and that it suffered actual damages and loss as a result of the interference. The partnership prop-

erly pleaded a cause of action for tortious interference with its contract to sell the hospital. *See Armendariz v. Mora,* 553 S.W.2d 400, 404 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

Paragraph V of the partnership's counterclaim states:

> The amount of damage sustained by Defendants due to Plaintiffs' tortious interference with business and contractual relations is the amount of the difference between the current sale price of the hospital and the amount of the previous best offer, which difference is Seven Million Dollars ($7,000,000.00).

The testimony at trial showed that the contract to sell was still intact and the sale was only postponed for two months. The measure of damages awarded by the jury and granted by the trial court's judgment was the loss of profit caused by the delay of the closing date.

[1, 2] Plaintiffs contend that, because the partnership did not list damages caused by delay in their cross-claim, the pleadings will not support a judgment for such damages. We disagree. The law is well settled that the claimant is not required to allege the applicable legal measure of damages, and if all facts necessary to raise the issue on a proper measure of damages are in evidence, the court must submit a proper measure of damages to the jury. *Sneed v. Martin,* 292 S.W.2d 891 (Tex. Civ. App. —Dallas 1956, no writ); *Dallas Railway & Terminal Co. v. Strickland Transportation Co.,* 225 S.W.2d 901 (Tex. Civ. App.—Amarillo 1949, no writ).

[3] Plaintiffs' second point of error alleges that the trial court erred in entering judgment against them, because the counterclaim was in fact founded upon a mali-

cious prosecution claim which was neither pleaded nor proved. They contend that, although the counterclaim is called tortious interference, the real theory on which evidence was presented was that plaintiffs had harmed the partnership by filing suit against it. One element to maintain a malicious prosecution action is a showing that the partnership had already prevailed on plaintiffs' suit before they could file a malicious prosecution action. *Smart v. Carlton,* 557 S.W.2d 553 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

As we have previously stated, the partnership properly pleaded a cause of action for tortious interference.[1] By its finding in answer to Special Issue No. 19, the jury found a tortious interference.[2] Plaintiffs contend that

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1. Paragraphs II and III of the counterclaim state:

II.

HNHP has an existing business and contractual relationship with LeRoy Pesch, M.D., Health Resources Corporation of America ("HRCA") and HNMC, Inc., a corporation formed by Dr. Pesch to facilitate his relations with HNHP. This relationship has ripened and grown to where HNHP has agreed to sell its hospital to HNMC, Inc. The sale was due to close on November 1, 1982. The sales price will include an initial payment of approximately Sixty Million Dollars ($60,000,000) and additional tens of millions of dollars to be paid out over time.

III.

Plaintiffs have made various false claims against HNHP. Plaintiffs have caused their false claims and allegations to be communicated to HNMC, Inc., HRCA and Dr. Pesch. Plaintiffs have further interfered with Defendants' business and contractual relationships by causing Mrs. Reba Eichelberger, acting as their agent and in conspiracy with them, to delay and prevent the sale of the hospital. In so doing, Plaintiffs have tortiously interfered with HNHP's business and contractual relationships.

2. Special Issue No. 19 reads as follows:

Do you find from a preponderance of the evidence that Louis Hughes or Phillip Eichelberger, Jr. tortiously interfered with the

because evidence of the pending suit was before the jury, the cause of action was for malicious prosecution. We disagree.

Litigation is a powerful weapon, and when instituted in bad faith for the purpose of causing damage or loss, it is a wrongful method of interference. The fact that the filing of a lawsuit could also serve as a basis for malicious prosecution is immaterial.

[4-6] Plaintiffs' third point of error alleges that the evidence was legally and factually insufficient to support the judgment of tortious interference. In reviewing for legal sufficiency, we limit the scope of our inquiry to the determination of whether there is any evidence in the record to support the jury finding, viewing the evidence in the light most favorable to the findings and disregarding all evidence and inferences to the contrary. *In Re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951). In contrast, in reviewing for factual sufficiency, we look at all the evidence in the record to determine if the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the finding should be set aside and a new trial ordered. *Garza v. Alviar,* 395

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contractual relations of Houston North Hospital Properties with respect to the proposed purchaser of the hospital complex?

Answer "We do" or "We do not" as to Louis Hughes.

ANSWER: "We do".

Answer "We do" or "We do not" as to Phillip Eichelberger, Jr.

ANSWER: "We do".

You are instructed that "tortious interference" means intentional action calculated to cause damage to Houston North Hospital Properties in regard to any contracts which it has and which action is done with the purpose of causing it damage or loss without justifiable cause on the part of Louis Hughes or Phillip Eichelberger, Jr. and which action results in actual damage or loss to Houston North Hospital Properties.

S.W.2d 821 (Tex. 1965). We have closely examined the evidence, and conclude that the evidence is sufficient to support the judgment.

The contract to sell the hospital was a document entitled "Purchase Agreement" dated June 28, 1982, between the partnership as seller, and HNMC, Inc., represented by Dr. LeRoy Allen Pesch, as purchaser. It included a term wherein the buyer agreed to pay the partnership four percent of the net revenues of the hospital for 10 years after the sale. The contract called for a closing of the sale on November 1, 1982.

[7] Plaintiffs contend that by an agreement dated July 10, 1982, the parties agreed to delay the closing to January 4, 1983, because the purchaser needed the additional time to obtain financing; therefore, they were not the cause of the delay. However, the agreement of July 10 did not move the closing date to January 4, 1983. Instead, it allowed the purchaser to satisfy the cash payment at the November closing by giving a note payable on January 4, 1983. The July 10 agreement did not change the closing date. The week before the trial began on November 8, 1982, the closing date was moved back to January 4, 1983. The evidence demonstrated that the sale was less beneficial to the partnership than it would have been if there had been no interference with its contractual relations. Although the contract to sell was still intact, Texas law recognizes that interference which makes performance more burdensome or difficult, or of less or no value to the one entitled to performance, may constitute an actionable tort. *Tippett v. Hart,* 497 S.W.2d 606 (Tex. Civ. App.—Amarillo), *writ ref'd n.r.e. per curiam,* 501 S.W.2d 874 (Tex. 1973).

[8] Four percent of the net revenues was estimated by witnesses for the partnership to be between $400,000 and $417,000 per month. The jury awarded $412,000, which is roughly equivalent to one month of delay. The evidence was ample that the partnership suffered damage due to the interference. Damages must be established with reasonable certainty, *Jordan v. Cartwright*, 347 S.W. 2d 799 (Tex. Civ. App.—Fort Worth 1961, no writ), but the amount of damages need not be certain, or future damages would never be recoverable. *See Adams v. Hood County Sand & Gravel Co.*, 354 S.W.2d 593 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

In their fourth point of error, plaintiffs complain that it was error to admit evidence of Mrs. Reba Eichelberger's appearance before the Texas Health Facilities Commission under Tex. Rev. Civ. Stat. Ann. art. 4418h, sec. 3.09 (Vernon Supp. 1984). Mrs. Eichelberger appeared before the Commission in opposition to the partnership's application for a certificate of need concerning the expansion of the hospital.

[9] Plaintiffs' only argument under this point is that proceedings before the Commission are privileged, citing *Reagan v. Guardian Life Insurance Co.*, 140 Tex. 105, 166 S.W.2d 909 (1942). That case stated the rule of privilege as follows:

> An absolutely privileged communication is one for which, by reason of the occasion upon which it was made, no remedy exists in a civil action *for libel or slander*. (Emphasis added).

166 S.W.2d at 912. The privilege applies only to libel and slander actions against the person testifying at judicial

or quasi-judicial proceeding. The fourth point of error is overruled.

[10] In point of error No. 5, plaintiffs allege that the answer to Special Issue No. 21 was against the greater weight and preponderance of the evidence.[3] We disagree. We have reviewed the record in this case under the applicable standard and find the evidence to be sufficient.

The testimony of independent tax counsel, a certified public accountant, real estate appraisers, the comptroller for the corporation, partners and stockholders, and the records of the corporation and partnership would entitle, if not compel, the jury to believe that there was no "commingling" of any assets and that the cancellation of the hospital lease in 1980, and the sale of the 7.7 acres of land in 1980, and the cancellation of the management contract in 1982 were beneficial to the corporation and its stockholders. A reasonable inquiry by plaintiffs before suit would have revealed no reasonable cause to bring a derivative suit.

In point of error No. 6, plaintiffs argue that the trial court erred in failing to impose a constructive trust on the assets of the corporation and the partnership. We disagree.

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3. Special Issue No. 21 reads as follows:

Do you find from a preponderance of the evidence that Louis Hughes and Phillip Eichelberger, Jr. brought their derivative suit in this case without reasonable cause?

ANSWER "We do" or "We do not."

ANSWER: "We do".

In connection with this Special Issue, you are instructed that the "derivative suit" in this case refers to the claims brought on behalf of Houston Northwest Medical Center, Inc., related to the sale of the 7.7 acre parking lot, the termination of the hospital Lease, the cancellation of the hospital Management Contract, and the handling of the corporate assets.

[11, 12] As we have previously stated, the jury resolved all special issues against plaintiffs. In order to prevail on this point, plaintiffs must show that the evidence establishes conclusively, or as a matter of law, their right to a constructive trust. *See Horton v. Dental Capitol Leasing Corp.*, 649 S.W.2d 655 (Tex. App.—Texarkana 1983, no writ); *Visage v. Marshall*, 632 S.W.2d 667 (Tex. App.—Tyler, 1982, writ ref'd n.r.e.). Corporate officers and directors owe the corporation and its shareholders a duty to act only in their best interest. *See International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963). A constructive trust is imposed by law because a wrongdoer would be unjustly enriched or would profit by his breach of fiduciary duty. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (1960).

[13] The acts complained of by the plaintiffs were shown to be beneficial to the corporation, and all money belonging to the corporation was accounted for through an inter-company transfer. The record fails to show that the partnership was unjustly enriched.

[14] By points of error Nos. 7, 8, 9, 10, 11, 12 and 13, plaintiffs complain of rulings on special exceptions and the admission and exclusion of evidence. Plaintiffs fail to cite any authority and present only a general statement in support of these points. Tex. R. Civ. P. 418(e) (Vernon Supp. 1984). Points of error not supported by argument and authorities are waived. *Leckey v. Warren*, 635 S.W.2d 752 (Tex. App.—Corpus Christi 1982, no writ); *Dryden v. Dairyland County Mutual Insurance Co.*, 633 S.W.2d 912 (Tex. App.—Beaumont 1982, no writ).

[15] By point of error No. 15, plaintiffs allege that the cumulative effect of all the errors was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. We have found no assigned error; therefore, this point is without merit and is overruled. To obtain a reversal of a judgment an appellant must first show that there was error in fact. *Fulmer v. Thompson*, 573 S.W.2d 256, 265 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

[16] Plaintiffs' fourteenth point alleges error in the declaratory adjudication that the partnership had no liability to plaintiffs on claims "which might have been" presented in this suit. The judgment recites as follows:

> It is therefore ORDERED, ADJUDGED and DECREED that all Defendants/Cross-Plaintiffs have judgment pursuant to the Declaratory Judgment Act, Article 2524-1, V.A.T.S. DECLARING, and it is hereby DECLARED that none of the Defendants have any liability to Plaintiffs upon any claims or causes of action which were *or which might have been* presented herein, including any assertion of any interest in the realty described in Exhibit A against any of the parties hereto. (Emphasis added).

The partnership argues that in declaring their rights, the trial court went no further than the law of res judicata permits. We disagree.

The law of res judicata in Texas was correctly stated by our Supreme Court in *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771-772 (Tex. 1979) as follows:

> The doctrine of res judicata states that a cause of action once finally determined, without appeal,

> between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. Steakley & Howell, *Ruminations on Res Judicata*, 28 S.W. L.J. 355 (1974). The scope of res judicata is not limited to matters actually litigated; the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litigated, but also on causes of action or defenses *which arise out of the same subject matter* and which might have been litigated in the first suit. (Emphasis added).

In any event, the trial court should not declare the effect of the judgment on other claims and causes of action not in issue.

The judgment is modified to delete the phrase "or which might have been," and as modified, is affirmed.

APPENDIX B

NO. 82-32542

IN THE DISTRICT COURT OF HARRIS COUNTY TEXAS, 11th JUDICIAL DISTRICT

LOUIS B. HUGHES, ET AL.

v.

HOUSTON NORTHWEST MEDICAL CENTER, INC.

CHARGE OF THE COURT

Members of the Jury:

This case is submitted to you on special issues consisting of specific questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and

heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide an issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figure and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the foreman shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses,

parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The foreman or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

By the term "*preponderance of the evidence*" as used in this Charge, is meant the greater weight and degree of credible evidence before you.

You are instructed that corporate directors are fiduciaries and at all times owe a fiduciary duty to the corporation and its shareholders. This means that directors hold a position of trust and confidence toward the corporation and its shareholders. As fiduciaries, directors must exercise the utmost good faith and fair dealing in all transactions touching upon their duties toward the corporation and its property. The responsibility of the corporate fiduciary includes the dedication of his uncorrupted business judgment for the sole benefit of the corporation.

You are instructed that "commingling" or mixing together of property of one company with that of a partnership, coupled with the use or appropriation of the mixed property, so that the property cannot be identified, is the breach of a fiduciary duty.

In deciding these special issues, you are instructed to consider only acts and events which have occurred since February 23, 1979.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by

circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

When words or phrases are used in the following issues or questions in a sense which varies from the meaning commonly understood, you have been given a proper legal definition which you are bound to accept.

You are further instructed that no breach of a fiduciary duty shall be found by you with regard to any part of any special issue if, in such connection, the directors of Houston Northwest Medical Center, Inc. acted in the exercise of ordinary care, and in good faith.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the directors of Houston Northwest Medical Center, Inc. breached their fiduciary duties to the corporation and all of its shareholders:

A. When they terminated the lease on the hospital? Answer "We do" or "We do not."

ANSWER: A. "We Do Not"

B. When they terminated the management contract on the hospital? Answer "We do" or "We do not."

ANSWER: B. "We Do Not"

C. When they transferred the 7.7 acre parking lots to Houston North Hospital Properties? Answer "We do" or "We do not."

ANSWER: C. "We Do Not"

D. By the commingling, if any, of the assets of Houston Northwest Medical Center, Inc., and Houston

North Hospital Properties? Answer "We do" or "We do not."

ANSWER: D. "We Do Not"

SPECIAL ISSUE NO. 1A

Were any of such breaches of fiduciary duties if any by such directors a proximate cause of any monetary damage to Houston Northwest Medical Center, Inc.?

Answer "We do" or "We do not" to each of parts A, B, C, and D as listed in Special Issue No. 1:

ANSWER A. "We Do Not" B. "We Do Not"
C. "We Do Not" D. "We Do Not"

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

If you have answered "we do" to any part of Special Issue No. 1A, and only in that event, then answer the *corresponding part* of:

SPECIAL ISSUE NO. 2

What do you find from a preponderance of the evidence to be the damage, if any, to Houston Northwest Medical Center, Inc. from the director's breach of fiduciary duties, if any, with respect to:

A. the termination of the lease on the hospital? Answer in dollars and cents, if any.

ANSWER A. $_____

B. the termination of the management contract on the hospital? Answer in dollars and cents, if any.

ANSWER B. $_____

C. the transfer of the 7.7 acre parking lots to Houston North Hospital Properties?
Answer in dollars and cents, if any.

ANSWER C. $_____

D. the commingling, if any, of the assets of Houston Northwest Medical Center, Inc., and Houston North Hospital Properties?
Answer in dollars and cents, if any.

ANSWER D. $_____

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that before June 30, 1980 Phillip Eichelberger, Jr. knew, or in the exercise of reasonable diligence should have known, of the decision of Houston Northwest Medical Center, Inc., to agree to sell the 7.7 acre parking lot?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that before June 30, 1980 Phillip Eichelberger, Jr. knew, or

in the exercise of reasonable diligence should have known of the decision of Houston Northwest Medical Center, Inc., to agree to the termination of the hospital lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that before June 30, 1980 Phillip Eichelberger, Jr. knew, or in the exercise of reasonable diligence should have known, of any commingling of assets of Houston Northwest Medical Center, Inc.?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that before June 30, 1980 Louis Hughes knew, or in the exercise of reasonable diligence should have known, of the decision of Houston Northwest Medical Center, Inc. to agree to sell the 7.7 acre parking lot?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that before June 30, 1980 Louis Hughes knew, or in the exercise of reasonable diligence should have known, of the

decision of Houston Northwest Medical Center, Inc., to agree to the termination of the hospital Lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that before June 30, 1980 Louis Hughes knew, or in the exercise of reasonable diligence should have known, of any commingling of assets of Houston Northwest Medical Center, Inc.?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that Louis Hughes delayed for an unreasonable time in bringing a lawsuit to complain of the sale of the 7.7 acre parking lot, the hospital lease termination and the commingling of corporate assets, to the disadvantage of the Defendants?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that Phillip Eichelberger, Jr. delayed for an unreasonable time

in bringing a lawsuit to complain of the sale of the 7.7 acre parking lot, the hospital lease termination and the commingling of the corporate assets, to the disadvantage of the Defendants?

Answer "We do" or "We do not."

ANSWER: "We do"

In connection with this charge, you are instructed that "waiver" occurs when a party intentionally relinquishes a known right, acts in a manner inconsistent with an intent to claim such right, or fails to act in a manner consistent with an intent to claim such right.

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that by his conduct in accepting his share of the proceeds of the sale of the 7.7 acre parking lot by Houston Northwest Medical Center, Inc., Louis Hughes waived his complaints over that sale?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that by his conduct in accepting his share of the income from the management contract Louis Hughes waived his complaints over the termination of the hospital lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 12A

Do you find from a preponderance of the evidence that by his conduct in accepting the benefits of the corporate reorganization, Louis Hughes waived his complaints over the handling of the corporate assets?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that by his conduct in accepting his share of the proceeds of the sale of the 7.7 acre parking lot by Houston Northwest Medical Center, Inc., Phillip Eichelberger, Jr. waived his complaints over that sale?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that by his conduct in accepting his share of the income from the management contract Phillip Eichelberger, Jr. waived his complaints over the termination of the hospital lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 14A

Do you find from a preponderance of the evidence that by his conduct in accepting the benefits of the corporate

reorganization, Phillip Eichelberger, Jr., waived his complaints over the handling of the corporate assets?

Answer "We do" or "We do not."

ANSWER: "We do"

In connection with this charge you are instructed that a party is "estopped" to complain of a transaction when he acquiesces in the transaction to the detriment of the opposite party.

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that by his conduct in accepting his share of the proceeds of the sale of the 7.7 acre parking lot by Houston Northwest Medical Center, Inc., Louis Hughes is estopped to complain of that sale?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 16

Do you find from a preponderance of the evidence that, by his conduct in accepting his share of the income from the management contract, Louis Hughes is estopped to complain of the termination of the hospital lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 16A

Do you find from a preponderance of the evidence that by his conduct in accepting the benefits of the corporate

reorganization, Louis Hughes is estopped to complain of the handling of the corporate assets?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that, by his conduct in accepting his share of the proceeds of the sale of the 7.7 acre parking lot by Houston Northwest Medical Center, Inc., Phillip Eichelberger, Jr. is estopped to complain of that sale?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that, by his conduct in accepting his share of the income from the management contract, Phillip Eichelberger, Jr. is estopped to complain of the termination of the hospital lease?

Answer "We do" or "We do not."

ANSWER: "We do"

SPECIAL ISSUE NO. 18A

Do you find from a preponderance of the evidence that by his conduct in accepting the benefits of the corporate reorganization, Phillip Eichelberger, Jr., is estopped to complain of the handling of the corporate assets?

Answer "We do" or "We do not."

ANSWER: "We do"

In connection with the following Special Issues regarding "tortious interference," you are instructed as follows:

A party is responsible not only for his own personal acts, but also for the acts of other who are his agents or conspirators.

An agent is one who is authorized to act for another. Agency denotes a relationship of consent between two parties by which one of them is to act for and on behalf of the other, being subject to the other's control.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. Each party to a conspiracy is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination.

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that Louis Hughes or Phillip Eichelberger, Jr., tortiously interfered with the contractual relations of Houston North Hospital Properties with respect to the proposed purchaser of the hospital complex?

Answer "We do" or "We do not" as to Louis Hughes.

ANSWER: "We do"

Answer "We do" or "We do not" as to Phillip Eichelberger, Jr.

ANSWER: "We do"

You are instructed that "tortious interference" means intentional action calculated to cause damage to Houston North Hospital Properties in regard to any contracts which it has and which action is done with the purpose

of causing it damage or loss without justifiable cause on the part of Louis Hughes or Phillip Eichelberger, Jr., and which action results in actual damage or loss to Houston North Hospital Properties.

If you have answered either part of Special Issue No. 19 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 20

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Houston North Hospital Properties for any damage which was proximately caused by such tortious interference?

Answer in dollars and cents, if any.

ANSWER: $412,000.00

SPECIAL ISSUE NO. 21

Do you find from a preponderance of the evidence that Louis Hughes and Phillip Eichelberger, Jr., brought their derivative suit in this case without reasonable cause?

Answer "We do" or "We do not."

ANSWER: "We do"

In connection with this Special Issue, you are instructed that the "derivative suit" in this case refers to the claims brought on behalf of Houston Northwest Medical Center, Inc., related to the sale of the 7.7 acre parking lot, the termination of the hospital Lease, the cancellation of the hospital Management Contract, and the handling of the corporate assets.

If you have answered Special Issue No. 21 "We do," and only in that event, then answer:

SPECIAL ISSUE NO. 22

What sum of money, if any, do you find from a preponderance of the evidence to be the reasonable expenses, including attorneys' fees, incurred or expected to be incurred in the defense of Plaintiffs' derivative suit?

Answer in dollars and sents, if any.

A. Through the trial of this case to a final judgment?

ANSWER: $92,000.00

B. Through the appeal of this case, if one is taken, to a Court of Appeals?

ANSWER: $24,000.00

C. Through the application for a writ of error, if one is sought, before the Texas Supreme Court?

ANSWER: $8,000.00

After argument of counsel, you will retire to the jury room and select one of your number to serve as Foreman.

It is the duty of the Foreman:

1. to preside during your deliberations;
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the judge;

4. to vote on the issues, together with the other jurors;
5. to write your answers to the issues in the spaces provided thereon;
6. and to certify to your verdict on behalf of all of the jurors if your verdict is unanimous; otherwise if as many as ten of you agree upon all of the answers made and to the entire verdict, those jurors shall each sign the verdict as provided on the CERTIFICATE page.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff, and he is to do so only on instructions of the Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. When you have answered all of the issues you are required to answer as provided by this Charge, and your Foreman has written your answers in the spaces provided, and your verdict has been signed as above directed, you will summon the bailiff and be returned into Court with your verdict.

/s/ WM. N. BLANTON, JR.
Judge Presiding

CERTIFICATE

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To be signed by the foreman if unanimous)

_____

Foreman

To be signed by those rendering the verdict if not unanimous.

/s/ Signatures Illegible

Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUIS B. HUGHES and
PHILIP T. EICHELBERGER, JR.,

Petitioners,

v.

HOUSTON NORTHWEST MEDICAL CENTER, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

By their Petition for Writ of Certiorari (the "Petition") petitioners have presented this question:

> **Whether the finding below that petitioners' appearance before an administrative agency constituted tortious interference with contract impermissibly infringed upon the Petition clause of the First Amendment.**

There was no such "finding below" by any court or jury. At the trial of this case evidence was admitted concerning the conduct of Mrs. Reba Eichelberger, the wife of Petitioner Philip T. Eichelberger, Jr., before an administrative agency. The evidence was relevant on several grounds. No "finding" regarding Mrs. Eichelberger was rendered at any level.

The petitioners before this Court never appeared before any administrative agency. It was the wife of Petitioner Philip T. Eichelberger, Jr., who appeared before the administrative agency.

In order to get to the substance of the issue petitioners seek to raise, some restatement of the question presented will be necessary.

LIST OF PARTIES

There are only three parties to the tortious interference judgment being complained of:

(i) Houston North Hospital Properties, a Texas general partnership, which recovered the judgment for tortious interference;

(ii) Louis B. Hughes; and

(iii) Philip T. Eichelberger, Jr.

The individuals listed as respondents in the List of Parties in the Petition are all interested in the matter because they are general partners in Houston North Hospital Properties. They are not, however, proper respondents before this Court.

Houston Northwest Medical Center, Inc. has no interest whatever in the tortious interference judgment. Houston Northwest Medical Center, Inc. prevailed on a counterclaim for attorneys' fees under article 5.14(F) of the Texas Business Corporation Act based on a finding that petitioners had brought their shareholders' derivative suit without reasonable cause.[1] That award is not the subject of the Petition. Houston Northwest Medical Center, Inc. is not a proper respondent before this Court.

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[1] See Appendix B to Petition, pp. 27a-28a.

SUBJECT INDEX

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES	ii
SUBJECT INDEX	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. Petitioners Lack Standing to Raise the Question Presented Here	3
II. The Judgment Below Is Supported by an Adequate and Independent State Ground of Decision Because the Constitutional Question Presented Now Was Not Raised Below	4
III. Petitioners Have Demonstrated No Unconstitutional Infringement of the Right to Petition for Redress of Grievances	7
CONCLUSION	11

TABLE OF AUTHORITIES

PAGE

CASES

Austin Co. v. *Vaughn Bldg. Corp.*, 643 S.W.2d 113 (Tex. 1982) 6

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 (1983) 8

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 4

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 9

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 9

Engle v. *Isaac*, 456 U.S. 107 (1982) 6

Feminist Women's Health Center v. *Mohammad*, 586 F.2d 539 (5th Cir. 1978) 10

Gainesville v. *Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980) 9

Hankerson v. *North Carolina*, 432 U.S. 233 (1977) 6

Herndon v. *Georgia*, 295 U.S. 441 (1935) 6

Household Goods Carriers' Bureau v. *Terrell*, 452 F.2d 152 (5th Cir. 1971) 10

Hughes v. *Aycock*, 598 S.W.2d 370 (Tex.Civ.App. — Houston [14th Dist.] 1980, writ ref'd n.r.e.) 1

Hughes v. *Houston Northwest Medical Center, Inc.*, 647 S.W.2d 5 (Tex.App. — Houston [1st Dist.] 1980, no writ) 2

Hughes v. *Houston Northwest Medical Center*, 680 S.W.2d 838 (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.) 7

INS v. *Lopez-Mendoza*, 104 S.Ct. 3479 (1984) 6

McDonald v. *Smith*, 105 S.Ct. 2787 (1985) 8

MCI Communications Corp. v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 104 S.Ct. 234 (1983) 9

Michel v. *Louisiana*, 350 U.S. 91 (1955) 6

Secretary of State of Maryland v. *Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984) 3

PAGE

United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 9
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 6
Warth v. *Seldin*, 422 U.S. 490 (1975) 4
Watson v. *Glens Falls Insurance Co.*, 505 S.W.2d 793 (Tex. 1974) 6
Wolfe v. *North Carolina*, 364 U.S. 177 (1960) 6

STATUTES

Texas Business Corporation Act, art. 5.14(F) ii
TEX.REV.CIV.STAT.ANN. art. 6643a 2

TEXAS RULES

Texas Rule of Evidence 103 5
Texas Rule of Civil Procedure 274 5
Texas Rule of Civil Procedure 418 5
Texas Rule of Civil Procedure 469(e) 5

ARTICLES

Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974) 3

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Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In the early 1970's, petitioners Hughes and Eichelberger joined a Texas general partnership, respondent Houston North Hospital Properties. Because petitioners breached their duties as partners, they were involuntarily retired from the partnership in 1975. A long and bitter court battle ended with the decision in *Hughes* v. *Aycock*, 598 S.W.2d 370 (Tex.Civ.App. — Houston [14th Dist.] 1980, writ ref'd n.r.e.), affirming a judgment ousting petitioners as partners.

In mid-1982, the partnership announced that it had agreed to sell the hospital it owned. Immediately after the agreement to sell was announced but before a sale could be consummated, petitioners launched an unrestrained assault to block the sale. Specifically they did the following:

(1) they filed a baseless lawsuit;

(2) they filed groundless lis pendens notices on the hospital land and improvements; and

(3) they wrote threatening letters to the proposed purchaser of the hospital.

In addition to these things, petitioners conspired with the wife of one of them (Mrs. Reba Eichelberger) to have her appear ostensibly as an interested citizen before the Texas Health Facilities Commission. The Commission was considering a request by the prospective hospital purchaser for approval of a transfer of the Certificate of Need to operate the hospital. None of these respondents was a party to that administrative proceeding but any delay there naturally delayed consummation of the hospital sale.

It is, of course, easy to claim that your opponents' lawsuit is baseless but in this case it was proven six times over. The verdict speaks for itself. *See* Appendix B to Petition, pp. 14a-29a. This was a strike suit, plain and simple. As the state appellate court held, the evidence at trial "would entitle, if not compel, the jury to believe" that petitioners' suit was all wrong, even without regard to the four affirmative defenses which were also sustained by the jury's verdict. *See* Appendix A to Petition, p. 10a. As the lower court indicated, if petitioners had simply made "[a] reasonable inquiry" they would have seen that they had "no reasonable cause to bring" this suit. *Id.* at 10a.

The facts regarding the lis pendens are equally disturbing. An interlocutory appeal yielded the result that the respondents' ability to free the hospital from petitioners' lis pendens notices under TEX.REV.CIV.STAT.ANN. art. 6643a might depend entirely upon how much money petitioners were claiming as damages. *See Hughes* v. *Houston Northwest Medical Center, Inc.*, 647 S.W.2d 5 (Tex. App. — Houston [1st Dist.] 1980, no writ). Petitioners promptly increased their ad damnum to over $62,000,000.

The merits of the petitioners' suit were disproved at trial by the testimony of their own witnesses. Any disinterested review of

the record would yield the conclusion that this case was brought not in order to recover a judgment but in order to have a suit on file for purposes akin to blackmail.

The tortious interference counterclaim of respondent Houston North Hospital Properties was blessed with compelling merit. The trial court correctly instructed the jury that they could base a finding of tortious interference only upon action "done with the purpose of causing [Houston North Hospital Properties] damage or loss without justifiable cause . . . ." Because everything petitioners did was a sham, the jury returned a verdict for Houston North Hospital Properties for tortious interference.

Yet here we are, three years later, still waiting to enforce our judgment.

REASONS FOR DENYING THE WRIT

I.
PETITIONERS LACK STANDING TO RAISE THE QUESTION PRESENTED HERE

Only Reba Eichelberger appeared before the administrative agency in the purported exercise of a First Amendment right under the Petition Clause. Only Drs. Hughes and Eichelberger are petitioners before this Court. This is, then, a case of assertion of jus tertii.

Someone once said that this Court's general rule denying standing to litigants asserting the rights of third parties "seems honored only in the breach." Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 425 (1974). It should be honored in the observance here because it so distinctly applies and because no exception to the rule is applicable.

As summarized by this Court most recently, the law of standing honored by this Court includes "prudential considerations that limit the challenges courts are willing to hear." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984). A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

The issue in this case becomes one of whether an exception should be made in favor of petitioners.[2] Certainly none of the exceptions previously created fits the facts of this case. Even if we focus on first Amendment cases, we see that there is nothing preventing or "chilling" Mrs. Eichelberger's freedom to assert her own rights. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). The activity sought to be protected (objecting to an administrative transfer of a certificate to operate a hospital) is obviously not "at the heart" of Mrs. Eichelberger's relationship with the petitioners. *See Munson*, 104 S.Ct. at 2850.

Unless some new exception is to be created to fit the facts of this case, the general rule against assertion of jus tertii deprives petitioners of standing before this Court.

II.
THE JUDGMENT BELOW IS SUPPORTED BY AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION BECAUSE THE CONSTITUTIONAL QUESTION PRESENTED NOW WAS NOT RAISED BELOW

Petitioners' case has traveled from state District (trial) Court, to the state Court of Appeals where judgment was affirmed, to the Texas Supreme Court which considered the case in its decision to refuse petitioners' writ, with a finding of "no reversible error." According to the Texas Rules of Evidence and the Texas Rules of Civil Procedure, petitioners had at least three different opportunities to assert that the conduct of Mrs. Reba Eichelberger in appearing before an administrative agency was protected by petitioners' First Amendment rights. They were:

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[2] Respondents note that the Petition in this case invokes no exception to the general rule but merely declares: "Accordingly, the First Amendment right to petition the government is variously referenced to herein as *belonging* to both Mrs. Eichelberger and petitioners." (Emphasis added) Petition, p. 4, n. 1.

1. The opportunity to object to the introduction of evidence in the trial court on the ground of objection asserted herein, *viz*, the infringement of petitioners' First Amendment rights;[3]

2. The opportunity to object to the charge to be presented to the jury by specifying this complaint to that charge;[4]

3. The opportunity to present petitioners' First Amendment claims to the Court of Appeals under a "Point of Error" in their Brief.[5]

At none of these stages in the proceedings below did petitioners assert any First Amendment right. And, although such a complaint would probably have been considered waived by the Texas Supreme Court[6], petitioners never even mentioned the First Amendment in their Application for Writ of Error to that court.

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[3] Texas Rule of Evidence 103(a)(1) provides that: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." During the trial of this cause neither petitioners' nor Mrs. Eichelberger's First Amendment rights were asserted. (Statement of Facts, pp. 960-973).

[4] Texas Rule of Civil Procedure 274 provides that "A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection." Petitioners' objections to the tortious interference jury question had nothing to do with the ground of objection they now assert. (Statement of Facts, pp. 1412-1413).

[5] Texas Rule of Civil Procedure 418(d) requires that briefs contain "[a] statement of the points upon which the appeal is predicated .... Such points will be sufficient if they direct the attention of the court to the error relied upon." None of the Points of Error in petitioners' state Court of Appeals brief implicated any First Amendment claims. *See* Brief for Appellants in the Court of Appeals for the First Supreme Judicial District of Texas, pp. ix-xi "Statement of Points of Error."

[6] Texas Rule of Civil Procedure 469(e) requires that points raised in an application for writ of error in the Texas Supreme Court "... be assigned as error in the motion for rehearing in the Court of Appeals ...."

Texas procedural law clearly provides many avenues for the assertion and preservation of a claim of error. These petitioners followed none of them.

If Texas is to have confidence in the finality of the decisions of its appellate courts, its rules of civil procedure cannot be lightly disregarded. It is well established in Texas that a claim of error is either preserved in the court below or lost. *Austin Co.* v. *Vaughn Bldg. Corp.*, 643 S.W.2d 113, 116 (Tex. 1982); *Watson* v. *Glens Falls Insurance Co.*, 505 S.W.2d 793, 797-98 (Tex. 1974). There can be no error in the judgment of the Court of Appeals in Texas predicated on a point not preserved before that Court. *Watson* v. *Glens Falls Insurance Co., supra.*

At trial and at both appellate levels, petitioners failed to take advantage of the available mechanisms for the preservation of error on their First Amendment claim. Petitioners' waiver constitutes an adequate and independent state ground of decision in this case based on the legitimate interests of the State of Texas.

This Court has traditionally governed itself with the principles of comity and orderly administration of justice by refusing to review state court decisions based on nonfederal procedural grounds that provide adequate and independent support for the judgment, even in the presence of a substantial federal question. *See, e.g., Wolfe* v. *North Carolina*, 364 U.S. 177 (1960); *Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Herndon* v. *Georgia*, 295 U.S. 441 (1935). Even in criminal cases where the life or liberty of the petitioner may be at stake, a failure to preserve error according to state rules results in waiver of the right to complain of that error. *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977).

This Court has recently applied the rule that if the admission of evidence is not objected to on a specific ground, that ground cannot be used as the basis for an appeal. *INS* v. *Lopez-Mendoza*, 104 S.Ct. 3479 (1984).

Petitioners nowhere explain their failure to properly raise a First Amendment claim while they proceeded through the Texas state court system. They have defaulted under each of the Texas Rules of Civil Procedure cited above and have thereby waived their right to challenge the judgment of the Texas courts.

III.
PETITIONERS HAVE DEMONSTRATED NO UNCONSTITUTIONAL INFRINGEMENT OF THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. The issue framed by the petitioners is not presented in this litigation.

Petitioners attempt to bring a question before the Court which is not presented by the litigation below. In fact, the Question Presented in the Petition assumes an erroneous interpretation of the judicial result and a subtly deceptive characterization of the facts.

There was no "finding below that petitioners' appearance before an administrative agency constituted tortious interference with contract." Instead, the jury found, on the basis of all the evidence admitted, "that Louis Hughes [and] Philip T. Eichelberger, Jr. tortiously interfered with the contractual relations of Houston North Hospital Properties with respect to the proposed purchaser of the hospital complex."[7]

There was evidence of an appearance before an administrative agency, the Texas Health Facilities Commission, but it was the appearance of neither of the petitioners. Reba Eichelberger's appearance before the agency was not the only evidence of petitioners' concerted effort to delay and prevent the sale of

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[7] Special Issue No. 19 and the jury's answer thereto is set out in footnote 2 of the Opinion of the Court of Appeals of Texas for the First Supreme Judicial District, *Hughes* v. *Houston Northwest Medical Center, Inc.*, 680 S.W.2d 838, 841 (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.), reprinted as Appendix A to the Petition (pp. 6a-7a). The issue also appears in the court's charge, reprinted as Appendix B to the Petition (pp. 26a-27a).

respondents' valuable property. The legal and factual sufficiency of the evidence was challenged in the state appellate courts which, after close examination, concluded the evidence was sufficient to support the judgment.[8]

B. The First Amendment issue petitioners raise has recently been determined by this Court adversely to petitioners.

The evidence of Reba Eichelberger's performance before the Texas Health Facilities Commission supported, but was hardly the sole basis for, respondents' cause of action for tortious interference. Petitioners' argument that the affirmance of the judgment "was wholly inconsistent with petitioners' right to freely inform the government of their wishes" is ultimately an argument for absolute immunity. The limits of the First Amendment right to petition the government were addressed by this Court as recently as last term in *McDonald* v. *Smith*, 105 S.Ct. 2787 (1985). The unanimous Court was "not prepared to conclude . . . that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right." *Id.* at 2790. Similarly, there is nothing to suggest the Framers meant to insulate from liability those who would scheme to delay or prevent other parties' performance of a contract by needlessly invoking the administrative procedures of a governmental agency. Although petitioners would limit the implication of *McDonald* to defamation cases (*See* Petition, p. 8, n. 2), this Court made particular reference to the lack of absolute immunity in other contexts:

> Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461

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[8] *See Hughes* v. *Houston Northwest Medical Center*, 680 S.W.2d 838, 842 (Tex.App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.), reprinted on p. 8a of the Petition.

U.S. 731, 743 (1983); accord, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The Petition offers no arguments for reconsideration of this authority.

C. There is no conflict among the Courts of Appeals on any issue in this case.

Without attempting to show how petitioners might benefit from one of the allegedly conflicting descriptions of a sham, the Petition urges the granting of the writ to resolve a conflict among the Courts of Appeals by "defining the parameters of the sham exception." This case does not require any such resolution of judicial conflict to resolve the issues in the case.

In *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), cert. denied, 104 S.Ct. 234 (1983) a case cited by petitioners, the court noted that the *Noerr*[9] and *Pennington*[10] cases "themselves provide little definition of what a sham may be other than to indicate immunity for 'genuine efforts' or 'good faith' attempts to influence governmental bodies." 708 F.2d at 1155. The court found one of the more cogent definitions of sham proceedings in *Gainesville* v. *Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980):

> Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation or administrative proceedings a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*. Rather, the requisite motive for the sham exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of litigation.

Under this definition, or any other, the use of administrative procedure solely as a ploy to hinder a party in the performance of a contract is a sham.

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[9] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[10] *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); 488 F.Supp. at 1265-66 (emphasis in original); quoted at 708 F.2d at 1156.

D. The constitutional issue framed by petitioners does not affect the judgment in the case.

As the judgment below was not predicated upon any finding that Reba Eichelberger's activities constituted a tortious interference, the determination of the extent of her First Amendment rights is immaterial to the outcome of the case. The jury was charged to pass upon the conduct of the petitioners, not Mrs. Eichelberger. In its answer to Special Issue 19, the jury found petitioners' interference with the contractual relations of respondents without justifiable cause.

Even if Reba Eichelberger's activity was absolutely immune, the evidence of her activity was still admissible to show the purpose and character of the actions of petitioners. *United Mine Workers* v. *Pennington,* 381 U.S. at 670-71, n. 3; *Feminist Women's Health Center* v. *Mohammad,* 586 F.2d 539, 543, n. 7 (5th Cir. 1978); *Household Goods Carriers' Bureau* v. *Terrell,* 452 F.2d 152, 158, n. 18 (5th Cir. 1971). Before the intermediate Texas appellate court, these petitioners argued against the admissibility of this evidence on other grounds and lost. (*See* Petition, Appendix A, p. 9a). No issue raised before this Court would change the correctness of that ruling.

CONCLUSION

There is no good reason to further delay justice in this case. Respondents respectfully request that the Petition for Writ of Certiorari in this case be denied in all respects.

Respectfully submitted,

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